No. 651

Supreme Court of the United States

OCTOBER TERM, 1940

ANCHOR STOVE & RANGE COMPANY,
Plaintiff-Petitioner,

v.

MONTGOMERY WARD & COMPANY, INC.,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WALTER F. MURRAY,
GEORGE E. WALDO,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Anchor Stove & Range Company, plaintiff, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on October 14, 1940.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioner brought two suits for acts of unfair competition, comprising the selling of a counterfeit cabinet heater.

The counterfeit heater was made by a manufacturer for the respondent. The first of the two suits was brought by your petitioner against the manufacturer and resulted after nine years of continuous litigation in a final decree that found the manufacturer guilty of unfair competition, but granted your petitioner only nominal damages. Then this second suit was brought by your petitioner against the respondent. Respondent filed a motion to dismiss the Bill, largely on the ground of laches. This motion was granted and the Bill was dismissed on its merits, without granting your petitioner a hearing. The reason given by the District Court for its action was that petitioner had not filed its brief in opposition to the motion within the ten days fixed by Rule 30A of the District Court. Your petitioner appealed the case, and gave as its reasons for the appeal the following errors:

The District Court erred:

1. In entering the order of November 1, 1939.
2. In dismissing the case.
3. In dismissing the case on the ground of plaintiff's failure to file its reply on time.
4. In holding that the complaint is without merit.
5. In denying plaintiff's motion to vacate the dismissal order, and grant leave to file brief and set for hearing.

The Court of Appeals affirmed the lower court, on the ground that petitioner was guilty of laches in the filing of the suit, but did not pass on the question of whether or not the District Court erred in dismissing the case on the merits, without granting your petitioner a hearing.

The Bill of Complaint in the second suit alleged that the acts of unfair competition were respondent's sales of cabinet heaters which the respondent had caused to be manufactured for it in exact imitation of petitioner's cabinet heaters, by Rymer et al. doing business as the Dixie Foundry Company of Cleveland, Tennessee, defendant in

the first suit. Petitioner's said cabinet heaters were of unique design and bore the name of your petitioner as the manufacturer thereof.

At the request of respondent to the Dixie Foundry Company, the latter's name as manufacturer of the imitative heater was omitted therefrom and the name of the respondent only was placed on these heaters. Petitioner prior to the aforesaid actions of the respondent had created a demand by the public for petitioner's cabinet heaters of the aforesaid unique design, and had given exclusive agencies for the sale of its said cabinet heaters to retailers, that were located in the larger cities of certain designated states.

Respondent sold said imitative heaters through its branch houses which were located in the aforesaid cities in which your petitioner had given the exclusive agencies to retailers for the sale of its cabinet heaters of said unique design. The sales by respondent caused the petitioner's agents to cancel their agency contracts with petitioner and their orders for said cabinet heaters. Respondent's sales of the imitative heaters occurred in the year 1928. Your petitioner first brought the suit against Rymer et al. doing business as the Dixie Foundry Company et al. in the year 1930, in the United States District Court at Chattanooga, Tennessee, for its unfair competition in manufacturing the imitative heaters for the respondent and thereby placing in the hands of the respondent means for deceiving ultimate customers as to the source of manufacture of the imitative heaters. Said United States District Court in the first suit sustained the Bill of Complaint and entered a decree for an injunction and an accounting against the Foundry Company, which appealed from the decree to the United States Circuit Court of Appeals of the Sixth Circuit which affirmed the decree and remanded the case to the District Court for an accounting. The opinion is re-

ported at 70 Fed. Rep. (2d), page 386. The Master proceeded with an accounting and found that your petitioner had suffered damages in the amount of $18,842.75, by reason of the sales of the imitative heaters to the respondent. The District Court set the Master's award aside upon the ground that your petitioner had not proved that it would have made the sales of the imitative heaters that respondent made, and granted your petitioner only nominal damages. Petitioner took an appeal from this decree to the United States Circuit Court of Appeals, which upon June 29, 1938, affirmed the District Court's decree. The opinion of the Circuit Court of Appeals is reported at page 689 of 97 Fed. Rep. (2d). A petition for rehearing was denied by said Circuit Court of Appeals on the 4th day of October, 1938. A petition for writ of certiorari to this Honorable Court was denied upon the 5th day of December, 1938. The petition for writ was number 464.

The Bill of Complaint of petitioner against respondent was filed in the United States District Court in Chicago, on the 18th day of August, 1939.

Respondent filed the Motion to dismiss the Bill of Complaint on October 16, 1939, and filed a written Brief in support thereof on October 26, 1939. No notice was given by respondent of any setting of the Motion for hearing (Rec., page 15). Rule 30A of the United States District Court in Chicago contains a provision that "The adversary party shall file a reply brief within ten (10) days after the filing of the brief in support of said contested motion" (Rec., page 25). No hearing was had upon the Motion. Upon November 1, 1939, the District Court filed a memorandum in which the Court said that the plaintiff had not filed its brief that was due on October 26, 1939, and had made no application for extension of time, and therefore entered an Order of Dismissal. In so doing, the court said: "However the court, from the argument submitted by defendant, is of

the opinion that the complaint is without merit'' (Rec., page 12). Plaintiff on the 27th day of November, 1939, served upon counsel for respondent a copy of a motion to vacate the dismissal order of November 1st, and to grant the petitioner's leave to file its brief and to have a hearing upon the motion (Rec., page 13). Upon the 27th day of November, 1939, the District Court denied the motion to vacate the dismissal order (Rec., page 16). On January 5, 1940, Petitioner appealed from the dismissal order to the United States Circuit Court of Appeals of the Seventh Circuit. The United States Circuit Court of Appeals heard the arguments of petitioner's and of respondent's counsel upon October 4, 1940. Upon October 14, 1940, the Court of Appeals affirmed the District Court. The opinion is reported at page 893 of 114 Fed. (2d). In this opinion, after quoting the memorandum of the District Court, the Court of Appeals says:

> ''It will thus be observed that the District Court did not rest its decision upon the failure of plaintiff to comply with its rules, but acted upon the complaint upon its merits, albeit without the benefit of presentation by plaintiff. Plaintiff later filed a motion to vacate such order of dismissal, supported by affidavits seeking to excuse its failure to comply with the rules of the District Court, which motion was denied.''

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reason relied on for the allowance of the writ is that the United States Circuit Court of Appeals sanctioned an action by the Lower Court that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure by the Lower Court from the usual course of judicial proceedings was that of sustaining defendant's

motion to dismiss the bill of complaint and of dismissing the bill upon its merits, without notice to plaintiff of the date of hearing of the motion, and without giving plaintiff an opportunity to be heard on the merits of the bill.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7212, *Anchor Stove & Range Company, Plaintiff-Appellant* v. *Montgomery Ward & Company, Inc., Defendant-Appellee,* and that the said decree of the United States Circuit Court of Appeals of the Seventh Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ANCHOR STOVE & RANGE COMPANY,
By WALTER F. MURRAY,
GEORGE E. WALDO,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the District Court, not reported, appears at Record page 12. It found that the Bill of Complaint was without merit and dismissed it upon the Motion and Brief that was filed by the defendant. The United States Circuit Court of Appeals opinion is reported at 114 Fed. Rep. (2d), page 893. It noted that the District Court acted upon the complaint upon its merits without the benefit of presentation by plaintiff. The Court of Appeals likewise failed to pass on the validity of the action of the District Court in dismissing the bill on its merits without hearing from the plaintiff [114 Fed. Rep. (2d) 895].

THE JURISDICTION

Jurisdiction is invoked under Section 347, U. S. Code Title 28.

STATEMENT OF THE CASE AND QUESTION INVOLVED

The question involved is whether or not a District Court upon defendant's motion to dismiss a Bill of Complaint, which did not notify the plaintiff of the date of hearing thereof, may dismiss the bill upon the merits without a hearing and without a waiver thereof by the plaintiff.

ARGUMENT

The decision of the Circuit Court of Appeals for the Seventh Circuit affirming the order of the District Court, departs from the accepted course of judicial proceedings. The District Court's action was taken under local Rules 30-A and 30-B. These rules are printed at page 25 of the Transcript of Record. Rule 30-A relates to the filing of

motions and the time for filing briefs on motions. It does not provide for specifying the time for the hearing of such motions. Rule 30-B relates to the submission of contested motions. It provides in part that "No oral arguments will be heard on such matters unless directed by the Court. When all briefs have been filed, any interested party, upon giving notice, may present the matter to the Court for a ruling." Defendant did not give the plaintiff notice that it would present the motion to the Court for a ruling (Rec., page 15). The opinion of the District Court refers only to the fact that the defendant had filed its motion and its brief and that the plaintiff had filed no brief, and did not say that the defendant had given plaintiff notice that the matter would be presented to the Court for a ruling. The Circuit Court of Appeals refers to the fact that the complaint was dismissed upon the merits by the District Court without the Court's having the benefit of plaintiff's presentation of the matter [114 Fed. (2d) 894].

The Rules of Civil Procedure for District Courts of the United States adopted by this Honorable Court in September, 1938, contain the following paragraph under "Rule 6. Time. Section (d)":

> "For Motions—Affidavits. A written motion, other than one which may be heard ex parte, *and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing,* unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made an ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." (Italics ours.)

That the Court must have a hearing on the merits, in disposing of a case is held in the following cases:

Swift & Co. v. *Jones,* 145 Fed. Rep. 489-493;
Horn v. *Pere Marquette R. Co.,* 151 Fed. Rep. 626-636;
In Re American Home Furnishers' Corp., 296 Fed. Rep. 605-607;
In Re Associated Gas & Electric Co., 83 Fed. Rep. (2d) 734-736.

In *Swift & Co.* v. *Jones,* supra, the Court of Appeals of the Fourth Circuit had before it the validity of an order entered by the Lower Court referring the case to a Special Master who was "authorized to hear the same, and pass upon issues of fact arising out of the pleadings, and report his findings of fact to the Court." The Court of Appeals said at page 493 of 145 Fed. Rep.:

> "Moreover, the mode of proof prescribed for the trial of common-law cases by section 861 Rev. St. clearly indicates that such trials in the federal courts are only to be had before a jury *or the court in open court.*" (Italics ours.)

In *Horn* v. *Pere Marquette R. Co.,* 151 Fed. Rep. 626, his Honor Judge Lurton said at page 636:

> "It must be borne in mind that the authority of the judge at chambers, and I speak altogether of a judge exercising equity powers, and not of a common-law judge, or a judge administering law, as distinguished from equity, is that of the court itself. *Daniel's Chancery Pl. & Pr.* (4th Am. Ed.) 1323; *Prescott* v. *Roe,* 9 Bing. 104; *Walters* v. *Anglo-Am., etc., Trust Co.* (C. C.) 50 Fed. 317. *When there is no settled practice to guide a judge, the limitations upon his powers at chambers must be found in the distinction between those steps, in an equity cause, which tend to prepare the cause for hearing or preserve the subject-matter until such a hearing, and those judgments which adju-*

> *dicate the ultimate merits.* That which does not adjudicate the merits is interlocutory. Mr. Daniel defines an 'interlocutory application' as 'a request to the court or to a judge at chambers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the court, or to the protection of the property in litigation pendente lite, or to any matter upon which the interference of the court or judge is required before, or in consequence of a decree or order.' " (Italics ours.)

In *In Re American Furnishers' Corp.,* 296 Fed. Rep. 605, the Circuit Court of Appeals of the Fourth Circuit had before it the question of the validity of an order which the District Court had made for the sale of property whilst he was holding court outside of his district, by designation under Sections 13 and 14 of the Judicial Code, and which upon rehearing he had rescinded, on the ground that he did not have the power to make the order whilst outside of his district. The Appeal alleged that the District Court erred in holding that he had no power to make the order. His Honor Judge Woods said at page 607 of 296 Fed. Rep.:

> "The chief question here is whether the District Judge had the power at chambers in Parkersburg, where he was holding court under a special assignment provided by the Judicial Code, to entertain a petition to review the action of the referee in bankruptcy in ordering a sale of the property. The general rule is that a judge has no power to try cases, either in law or in equity, outside his own district. There is at least an implication in the federal Constitution and statutes that a party cannot be required to try his cause outside the territorial jurisdiction of the court in which it is pending. *The judge, however, has at chambers the authority and power to make all interlocutory orders and to do everything that is necessary to speed the cause and promote justice to the parties, except the actual trial on the merits."* (Italics ours.)

In *In Re Associated Gas & Electric Co.*, 83 Fed. Rep. (2d) 734, the Circuit Court of Appeals of the Second Circuit had before it the question of the validity of an order of the District Court of the United States for the Northern District of New York, directing that the trial of issues of insolvency of the debtor be held at the Judge's Chambers in the Southern District of New York. The Court of Appeals held that the issues that were directed to be heard in the Judge's Chambers in the Southern District of New York constituted a trial. On page 736 the Court of Appeals said:

> "The question presented is thus whether the judge has jurisdiction to try these issues in the Southern district of New York, without the debtor's consent."

The Court quotes Judicial Code, paragraphs 18 and 19, 28 U. S. C. A., paragraphs 22 and 23, to the effect that the District Judge "may be authorized to enter chambers orders elsewhere, by that fact, but such orders are those only covering administrative work, including the preparation of a case for trial. The exceptional authority to carry on preparation for trial outside the district where the case is pending does not go to the trial itself, even if heard without a jury." Finally the Court said:

> "While the order entered presents a finding of fact of the interest of the parties being best served by the trial in New York City, the debtor must be granted an opportunity to combat this, and, in the present proceeding, he was within his rights in objecting to the order made on the basis of judicial power alone. There was no transfer ordered here, and the order makes no pretention to be such a direction.
>
> "Order reversed." (Pages 737 and 738.)

It is submitted that the District Court in deciding the merits of the case, without granting a hearing to the plain-

tiff, and the Court of Appeals in affirming his decision, so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

THE BILL OF COMPLAINT PRESENTED A JUSTICIABLE CAUSE WHICH SHOULD HAVE BEEN HEARD BY THE DISTRICT COURT

The bill alleged that the plaintiff prior to the year 1928, had manufactured and sold a cabinet heater of distinctive design, known as the "Tudor Heater"; that by reason of the care, skill and fidelity with which plaintiff had conducted the manufacture of its products for a series of years, its heaters had acquired a high reputation in the trade, that it had expended large sums of money in advertising its heaters; that its heaters were handled by many dealers throughout the United States, particularly in the States of Indiana, Ohio, Kentucky, Tennessee, Virginia, West Virginia, Maryland, North Carolina, Alabama, Illinois, Iowa, Wisconsin, Minnesota, Missouri, Kansas and New York, in the larger cities of which states there were retail dealers, to whom plaintiff had given exclusive licenses to sell its "Tudor Heater"; that the defendant, Montgomery Ward & Company, after the plaintiff had established the public demand for its heaters, and fraudulently designing to procure the custom and trade of persons desiring to purchase plaintiff's said heater, and to induce them to believe that respondent's heater was in fact manufactured by plaintiff, made a contract with S. B. Rymer, C. D. Rymer and G. C. Brown, doing business in Cleveland, Tennessee, as the Dixie Foundry Company, to manufacture for it a cabinet heater of substantially identical design as that of plaintiff's Tudor heater, and directed said Foundry Company not to place the said Foundry's name upon the imitative heaters, but to place thereon only a plate that bore the name of the defendant Montgomery Ward & Company, and that

defendant had said Foundry Company ship the heaters to defendant's branch houses that were located in the territories in which plaintiff had dealers to whom it had given exclusive licenses to sell plaintiff's said Tudor heater. Furthermore, the Bill of Complaint says that the close similarity in appearance of defendant's heater to plaintiff's heater caused some of plaintiff's exclusive licensees to conclude that plaintiff was making the licensed heaters for defendant under another name, and that this had caused these retail dealers to cancel orders for these heaters which they had given to plaintiff and also had caused ultimate consumers to buy defendant's heaters under the impression that they were manufactured by the plaintiff. The bill further alleges that in the year 1930, the plaintiff had filed a Bill of Complaint against the said S. B. Rymer et al., which gave as one cause of the complaint the unfair competition of said Rymer et al. in manufacturing the imitative heater for Montgomery Ward & Company; that the District Court sustained the Bill of Complaint; that the United States Circuit Court of Appeals affirmed the District Court in an opinion reported at 70 Fed. Rep. (2d), page 386, and remanded the case for an accounting before a Master; that in the proceeding the Master had found damages in plaintiff's favor because of the loss of a specific number of these heaters, that were shipped on specific dates to specific branch houses of the respondent, Montgomery Ward & Company; that the District Court had reversed the finding of the Master upon the ground that plaintiff had not proved that it would have made the sales had Montgomery Ward & Company not made them; that the United States Circuit Court of Appeals for the Sixth Circuit had affirmed the District Court upon the same grounds, viz; that the plaintiff had the burden of proving that it would have made these sales to each of the ultimate consumers of these imitative heaters, if Montgomery Ward & Company had not

made them. The opinion of the Court of Appeals is reported at page 689 of 97 Fed. Rep. (2d). On this question of the burden of proof of loss of sales, the decision conflicts with that of the Circuit Court of Appeals of the Seventh Circuit in *Wrigley* v. *Larson,* 20 Fed. (2d) 830, 831. The Bill alleges also that a petition and rehearing was denied by the Court of Appeals on the 4th day of October, 1938; that a petition for writ of certiorari to this Honorable Court was denied on the 5th day of December, 1938. This petition was No. 464, October Term, A. D. 1938. The Bill further alleges that plaintiff, upon the 13th day of April, 1939, notified Montgomery Ward & Company of its infringement, and demanded payment of its damages. The Bill of Complaint against Montgomery Ward & Company was filed promptly thereafter, viz; on the 18th day of August, 1939.

It is submitted that these allegations manifest that your petitioner was not guilty of laches in instituting this suit, because in the interim between respondent's acts of infringement and the filing of the suit against respondent, petitioner was engaged in serious litigation against Rymer et al. doing business as the Dixie Foundry Co., on the same question of unfair competition in trade as is involved in this case. The following cases hold that laches does not result from delay occasioned by such litigation.

Southern Pacific Co. v. *Bogert,* 250 U. S. 483-488;
Metzger v. *Vinikow,* 17 Fed. (2d) 581 (C. C. A. 9);
Stearns-Rogers Mfg. Co. v. *Brown,* 114 Fed. 939-945 (C. C. A. 8).
U. S. Mitis v. *Detroit Steel & Spring Co.,* 122 Fed. Rep. 863-866 (C. C. A. 6);
Tompkins v. *St. Regis Paper Co.,* 236 Fed. 221-224 (C. C. A. 2);
Frank F. Smith Hardware Co. v. *S. H. Pomeroy Co.,* 299 Fed. 544-547 (C. C. A. 2);
U. S. Fire Escape Company v. *Wisconsin Iron & Fire Works,* 290 Fed. 171 (C. C. A. 7);

Edison Electric Light Co. v. *Mt. Morris Electric Light Co.*, 57 Fed. 642, at 644 (C. C. N. Y.);
Green v. *Barney*, 19 Fed. 420 (C. C.—D. Mass.);
Auditorium Conditioning Corp. v. *St. George Holding Co.* (D. C.—E. D. N. Y.), 19 U. S. P. Q. 64, at 72.

Yet the Court below said:

> "The mere fact of plaintiff's election to proceed in the first instance against the manufacturer alone, followed by its long drawn out litigation against the manufacturer does not excuse the plaintiff from seasonably asserting any cause of action that it might have desired to assert against the present defendant. It might now become quite inequitable for the defendant to be called upon to make an accounting for many detailed transactions in the sale of heaters throughout its various branches after so many years' delay." 114 Fed. Rep. (2d), page 895.

It is submitted that the action of the Court below in being solicitous about some probable equities of the respondent, is not in accord with the findings of this Honorable Court regarding the position before the Court of a defendant whose actions violate conscience or good faith. This Court in *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 237, at page 245 declares:

> "'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.'"

It is submitted that the statement of the Court below, "that it might now become quite inequitable for the defendant to be called upon to make an accounting" is in conflict with this declaration of this Honorable Court. The Court

below, without any proof whatever, on defendant's part, concludes that it might now become inequitable for the defendant to have to account for its fraudulent acts.

It is submitted that the action of the Court below in affirming the action of the District Court in dismissal of the bill without a hearing, so far departs from the accepted and usual course of judicial proceedings as to call for this Honorable Court's power of supervision, and that the petition for writ of certiorari should be allowed.

Respectfully submitted,

WALTER F. MURRAY,
GEORGE E. WALDO,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1940.

No. 651

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

STUART S. BALL,
JOHN A. BARR,
FRED T. BARRETT,
Counsel for Respondent.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum of the District Court, not reported, appears at page 12 of the record. The opinion of the Circuit Court of Appeals is reported in 114 Fed. (2d) 893, and is reprinted at page 35 of the record.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 14, 1940 (R. 40). The petition for a writ of certiorari was filed December 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

ARGUMENT.

I. The Only Question Raised By the Petition Is One That Was Not Necessary to the Decision and in Fact Was Not Decided By the Circuit Court of Appeals.

Only one question is raised by the Petition for Certiorari, the question whether or not it was error to dismiss the complaint upon its merits "without notice to plaintiff of the date of hearing of the motion, and without giving plaintiff an opportunity to be heard upon the merits of the bill" (pp. 5-6 of Petition).

The Circuit Court of Appeals, however, basing its affirmance of the District Court on the determination of two issues of substantive law which would effectively dispose of the case regardless of what procedure was followed, held that the determination of the procedural issue was not necessary to the decision.

Although by implication petitioner contends that the Circuit Court of Appeals erred in not considering the procedural issue, petitioner shows no reason either in logic or in precedent for considering a procedural question the determination of which could not possibly influence the ultimate decision in the case. This should in itself dispose of the entire Petition.

II. The Affirmance of the Decision Dismissing the Complaint Without a Hearing Is Not Inconsistent With Any Decision Cited By Petitioner.

However, should the affirmance of the District Court be considered as amounting to a holding that petitioner was not entitled to a hearing, petitioner's argument is fully answered by a brief demonstration that the decision is not inconsistent with the cases cited by petitioner.

Swift v. *Jones*, 145 Fed. 489, dealt with the impropriety of employing a special master to determine the facts in a case at law. It does not conflict with a decision denying a hearing or argument in opposition to a motion which accepted the facts stated in the complaint as true.

In re American Furnisher's Corp., 296 Fed. 605, *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, and *In re Associated Gas & Electric Co.*, 83 Fed. (2d) 734, all dealt with the power of a District Court judge to try cases or make orders in chambers when outside the judicial district. In the instant case no hearing was held and no order was made outside the district.

Horn v. *Pere Marquette*, 151 Fed. 626, also considered whether an order appointing a receiver could properly be made in chambers. That portion of the decision is inapplicable for the reason that it does not appear from the record in this case that any hearing was held or any order made in chambers (R. 12).

Petitioner has cited no case and given no reason to show that it was entitled to a hearing on the motion to dismiss, either under rules of court or by virtue of fundamental principles of law or equity.

III. The Circuit Court of Appeals' Decision As to the Applicability of Laches Was Not Necessary to the Decision and Also Was a Determination of a Question of Local Law Not Claimed to Be Inconsistent With Decisions of the State Courts.

In disregard of the rule that this Court will consider only the questions specifically brought forward by the Petition for Certiorari (Rule 38 (2)), another question is suggested by petitioner's brief. This is that the decision of the Seventh Circuit Court of Appeals on the applicability of laches is in conflict with decisions of other Circuit Courts of Appeals. The simplest answer is that the decision of the Seventh Circuit Court of Appeals was not based on laches alone but also upon the Illinois statute of limitations, which gave an independent ground for the decision not questioned by the Petition for Certiorari.

A further answer is that the decision on the applicability of laches was a determination of a question of local law. This being a case in which the equitable relief sought is predicated upon petitioner's legal rights,[1] the Seventh Circuit was applying the law of Illinois in obedience to the decision in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. See *Russell* v. *Todd,* 309 U. S. 280, 289, and *West* v. *American Telephone and Telegraph Co.,* .... U. S. ...., decided December 9, 1940. If the different results in the cases are not in fact justified by differences in the circumstances, the conflict must be attributed to differences in the local law, uniformity between circuits not being attainable in matters of local law when the United States Courts simply apply the local law of the states in which the cases arise. No conflict with any decision of the Illinois courts is shown or claimed to exist.

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1. See the Circuit Court of Appeals' statement that **Russell v. Todd, 309 U. S. 280,** is unavailable to the plaintiff because the remedy there was exclusively in equity: 114 Fed. (2d) at p. 895.

Conclusion.

Presumably petitioner seeks to have the case remanded to the District Court for argument on defendant's motion to dismiss. The futility of such procedure is obvious. Petitioner seeks only an opportunity to eventually present to the District Court an argument which already has been fully considered and determined in respondent's favor by the Circuit Court of Appeals. The Writ of Certiorari therefore should be denied.

Respectfully submitted,

STUART S. BALL,
JOHN A. BARR,
FRED T. BARRETT,
Counsel for Respondent.